

FILED
UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
JUN 24 2004 P 3:22

THE UNITED STATES OF AMERICA FOR
THE USE AND BENEFIT OF NEWPORT
SAND AND GRAVEL, INC.,
Plaintiff

V.

LINCOLN D. REALTY CORPORATION
AND
HARLEYSVILLE WORCESTER
INSURANCE COMPANY, SURETY,
Defendants

CIVIL ACTION NO. 04-40061 NMG

**DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT
OF THEIR RULE 12(b)(6) MOTION TO DISMISS**

I. NATURE AND STATUS OF PROCEEDINGS

This is an action in which the plaintiff, Newport Sand and Gravel, Inc. ("Newport"), is seeking payment under a payment bond issued by the defendants, Lincoln D. Realty Corporation (Lincoln), as principal, and Harleysville Worcester Insurance Company (Harleysville"), as surety, pursuant to 40 U.S.C. §§270a *et seq.* ("Miller Act") in connection with the construction of a United States Post Office in Clinton, Massachusetts (the "Project).

Lincoln and Harleysville now move to dismiss the complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure since Newport has failed to state a cause of action under the Miller Act as a result of its failure to provide Lincoln with notice of its bond claim within ninety (90) days of the date on which it last performed labor or furnished materials to the Project, and because it failed to commence suit within one (1) year from the day on which it last performed labor or material to the Project.

II. FACTS

Lincoln entered into a contract with the United States Postal Service for construction of the Project. Newport's Complaint ("Compl."), ¶6. In compliance with the Miller Act, Lincoln, as principal, and Harleysville, as surety, posted a payment bond for the Project ("Bond"). Id., ¶7. Lincoln contracted with Aztec Construction Co., Inc. ("Aztec") to provide certain labor and materials to the Project. Id. ¶8. Thereafter, Aztec entered into a subcontract with Newport to provide redi-rock wall blocks to the Project. Id. ¶9. By invoices dated June 15, 2002, June 30, 2002, July 15, 2002 and July 31, 2002 (the "Invoices"), Newport invoiced Aztec for all the materials provided by it to the Project. Id. ¶11, Exh. D. Newport now claims that Aztec only partial paid the Invoices, and an outstanding balance remains due it in the amount of \$8,224.40, exclusive of late fees. Id.

By letter dated July 11, 2003, Newport provided notice to Lincoln of its purported claim under the Bond. Id., ¶12. Newport filed this action under the Miller Act on April 28, 2004.

III. MOTION TO DISMISS STANDARD

Fed. R. Civ. P. 12(b)(6) provides that a complaint shall be dismissed "for failure to state a claim upon which relief can be granted." The purpose of this rule is to test the legal sufficiency of a complaint. Dismissal is appropriate if, as a matter of law, "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Gorski v. New Hampshire Dept. of Corr., 290 F.3d 466, 473 (1st Cir. 2002). No set of facts consistent with Newport's allegations can support a cause of action.

IV. ARGUMENT

A. Newport's Claim Is Time Barred Under The Miller Act.

The Miller Act requires a general contractor performing work on any public building or public work of the United States to furnish a payment bond in the total amount of the contract. 48 U.S.C. §270a(a). The purpose of the Miller Act is to supply security of payment to subcontractors and suppliers of United States public work projects. U.S. for the Use and Benefit of G.E. Supply v. C&G Enterprises, Inc., 212 F.3d 14 (1st Cir. 2000). Subcontractors having furnished labor or materials to a United States public construction project may sue to recover under the payment bond. Id. An actionable claim under the Miller Act requires strict compliance with the notice and limitation provisions contained therein. Here, Newport's Bond claim is barred because it failed to comply with both the ninety-day notice of claim requirement under Section 270b(a) and the one-year statute of limitation requirement under Section 270b(b).

Section 270b(a) of the Miller Act provides that "any person [Newport] having a direct contractual relationship with a subcontractor [Aztec] but no contractual relationship express or implied with the contractor furnishing said payment bond [Lincoln] shall have a right of action upon the said payment bond upon giving written notice to said contractor [Lincoln] within ninety days from the date on which such person [Newport] did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made" 40 U.S.C. §270b. The purpose of the 90-day notice requirement is to establish a time after which the principal contractor can pay its subcontractors without the risk of claims from those who have supplied labor or materials to the subcontractors. U.S. for Use of John D. Ahern Co., Inc. v. J.F. White Contracting, Co., 649 F.2d 29, (1st Cir. 1981). Fulfilling the Miller Act's notice provision is a strict condition precedent to recovery. U.S. for the Use and Benefit of Water Works Supply Corp. v. George Hyman Construction Co., 131 F.3d 28 (1st Cir. 1997).

Section 270b(b) of the Miller Act provides that “every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, . . . but no such suit shall be commenced after the expiration of one year after the day on which the last of the labor was performed or material was supplied by him.” 40 U.S.C. §270a(b); The United States of America for the Use and Benefit of G.E. Supply v. C&G Enterprises, Inc., 212 F.3d 14 (1st Cir. 2000)(action under Miller Act must be commenced within one year of delivering materials).

It is undisputed that Newport invoiced Aztec for all materials shipped to the Project by invoices dated June 15, 2002, June 30, 2002, July 15, 2002 and July 31, 2002. Compl. ¶11, Exh. D. A copy of the invoices are attached hereto as Exhibit A. Consequently, the 90-day notice mandated under Section 270b(a) to be giving to Lincoln should have been provided no later than October 29, 2002, and this action should have been initiated no later than July 30, 2003. Here, Newport admits that it did not provided the 90-day notice letter until July 11, 2003, more than eleven months after last furnishing materials to the Project. Newport then filed this action on April 28, 2004, approximately one year and nine months after last furnishing materials to the Project.

Newport asserts that its May 1, 2003 letter to Aztec stating that “the 5/8ths inch J-Bolt does meet the required test” constitutes furnishing labor thereby bringing the July 11, 2003 letter within the 90-day notice requirement period, and making this action timely under the one year statute of limitation period. Compl. ¶11, Exh C. A copy of the May 1, 2003 letter is attached hereto as Exhibit B. This assertion is simply without merit.

Remedial or corrective work, or inspection of work already completed, does not fall within the meaning of “labor” and will not extend the one-year limitation period under the Miller Act. U.S. for Use and Benefit of T.L. Wallace Const., Inc. v. Fireman’s Fund Ins. Co., 790 F.

Supp 680 (S.D. Miss 1992). Mere corrections of defects do not extend the time for providing the statutory notice under the Miller Act. U.S. for Use of Noland Co. v. Andrews, 406 F.2d 790 (4th Cir. 1969). Neither inspection of work already installed, nor correction of defective work, will toll the statutory period for bringing an action under the Miller Act. U.S. for Use and Benefit of T Square Engineering Corp. v. Gregor J. Schaefer Sons, Inc. 272 F.Supp 962 (E.D.N.Y. 1967). “The majority of circuits that have addressed this issue have held that remedial or corrective work or materials, or inspection of work already completed, falls outside the meaning of ‘labor’ or ‘materials’ under §270b(b). Hence performing such work or supplying such materials will not toll the Miller Act’s one-year statute of limitations.” U.S. for the Use and Benefit of Interstate Mechanical Contractors, Inc. v. International Fidelity Insurance Company, 200 F.3d 456, 460 (6th Cir 2000).

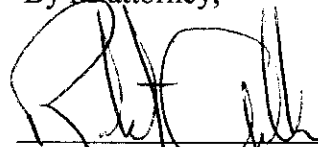
Newport’s reliance on its May 1, 2003 letter for circumventing the strict notice and limitation period under the Miller Act is simply unsupported by the statute and case law. The May 1, 2003 letter was not furnishing labor or supplying material to the Project as required under the Miller Act. Rather, the May 1, 2003 letter simply verifies that the Redi Rock Wall System supplied by Newport in June and July 2002 met the Project design specifications. This verification letter did not toll the 90-day notice requirement or the one-year statute of limitations under the Miller Act. Newport was required to provide Lincoln with a 90-day notice of claim on or before October 29, 2002. Thereafter, Newport was required to commence a civil action on or before July 30, 2003. Newport failed to timely perform either, thereby barring its claim for relief under the Miller Act.

V. CONCLUSION

For the reasons stated, the plaintiff's complaint fails to state a cause of action upon which relief can be granted and it should be dismissed under Federal Rules of Civil Procedure 12(b)(6).

LINCOLN D. REALTY CORPORATION
AND HARLEYSVILLE WORCESTER
INSURANCE COMPANY, SURETY

By its attorney,



Robert B. Gibbons, Esq.

BBO #631049

Mirick, O'Connell, DeMallie & Lougee, LLP
100 Front Street

Worcester, MA 01608-1477

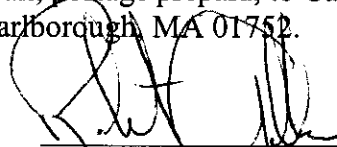
Phone: (508) 791-8500

Fax: (508) 791-8502

Dated: June 24, 2004

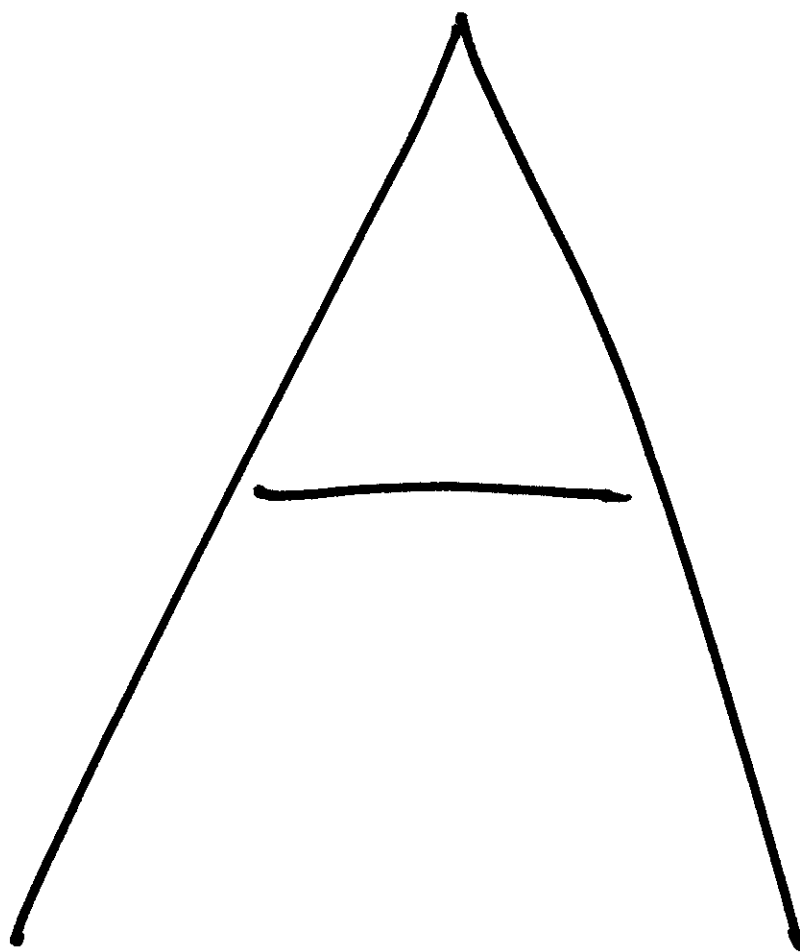
CERTIFICATE OF SERVICE

I, Robert B. Gibbons, Esq., hereby certify that I have this day served a copy of the foregoing document, by mailing a copy, first class mail, postage prepaid, to Carl F. Schmidt, Esq., Scmitt Dillon & Smillie, 5 Mount Royal Avenue, Marlborough, MA 01752.



Robert B. Gibbons, Esq.

Dated: June 24, 2004



D:\Bpt\p\sys\tech7\p\ts\Linda D\Open Amt.rpt
 {AROPEN/DUE_AMT} > 0.00 and
 {AROPEN/CUST_NBR} = "011014"

**** This report excludes finance charges outstanding ****

11/4/02 AZTEC CONSTRUCTION CO.

CUST_NBR	INVOICE#	INV_DATE	JOB#	JOB_DESC	CITY	DUE_AMT	PAID_AMT	OPEN_AMT	DATE_LAST_PD
011014	69895	6/15/02	000400	REDI ROCK WALL- BLOCKS	CLINTON	14,292.60	0.00	14,292.60	
011014	70522	6/30/02	000400	REDI ROCK WALL- BLOCKS	CLINTON	17,328.15	0.00	17,328.15	
011014	71373	7/15/02	000400	REDI ROCK WALL- BLOCKS	CLINTON	3,011.40	0.00	3,011.40	
011014	72081	7/31/02	000400	REDI ROCK WALL- BLOCKS	CLINTON	1,804.95	0.00	1,804.95	

Sub-total:

36,437.10

Grand Total:

36,437.10



Newport Sand & Gravel Co., Inc.
 PO Box 1000 603 863-1000
 Newport, NH 03773 fax 603 863-3660

INVOICE

CUSTOMER NO.	DATE	INVOICE NO.	PAGE
011014	06/30/2002	70522	1

AZTEC CONSTRUCTION CO. INC.
 2 POWDERMILL ROAD
 MAYNARD, MA 01754

DATE	JOB NUMBER - JOB LOCATION - ADDRESS				PRICE	PER UNIT	TAX	TOTAL
	TICKET NO	QUANTITY	UNIT	DESCRIPTION				
000400	AZTEC CONST. REDI-ROCK BLOCKS CLINTON							
06/17	002-44806	24.00	EA	RR ROCK FACE FULL BOTTO	70.000	EA	84.00	1680.00
06/17	002-44806	2.00	EA	RR ROCK FACE FULL FREE	70.000	EA	7.00	140.00
06/17	002-44806	24.00	EA	RR ROCK FACE FULL MIDDLE	70.000	EA	84.00	1680.00
06/17	002-44806	1.00	EA	RR ROCK FACE HALF TOP	35.000	EA	1.75	35.00
06/17	002-44806	51.00	EA	REDI ROCK DELIVERY CHAR	12.000	EA	30.60	612.00
06/18	002-44844	12.00	EA	RR ROCK FACE FULL FREE	70.000	EA	42.00	840.00
06/18	002-44844	12.00	EA	RR ROCK FACE FULL MIDDLE	70.000	EA	42.00	840.00
06/18	002-44844	1.00	EA	RR ROCK FACE FULL STEP	70.000	EA	3.50	70.00
06/18	002-44844	1.00	EA	RR ROCK FACE HALF FREE	35.000	EA	1.75	35.00
06/18	002-44844	26.00	EA	REDI ROCK DELIVERY CHAR	12.000	EA	15.60	312.00
06/20	002-44890	22.00	EA	RR ROCK FACE FULL MIDDLE	70.000	EA	77.00	1540.00
06/20	002-44890	22.00	EA	REDI ROCK DELIVERY CHAR	12.000	EA	13.20	264.00
06/20	002-44890	30.00	EA	MISC SALES	20.000	EA	30.00	600.00
06/21	002-44917	-1.00	EA	RR ROCK FACE FULL FREE	70.000	EA	-3.50	-70.00
06/21	002-44917	-2.00	EA	RR ROCK FACE FULL MIDDLE	70.000	EA	-7.00	-140.00
06/24	002-44952	22.00	EA	RR ROCK FACE FULL MIDDLE	70.000	EA	77.00	1540.00
06/24	002-44952	22.00	EA	REDI ROCK DELIVERY CHAR	12.000	EA	13.20	264.00
06/25	002-44980	12.00	EA	RR ROCK FACE FULL BOTTO	70.000	EA	42.00	840.00
06/25	002-44980	22.00	EA	RR ROCK FACE FULL MIDDLE	70.000	EA	77.00	1540.00
06/25	002-44980	34.00	EA	REDI ROCK DELIVERY CHAR	12.000	EA	20.40	408.00
06/27	002-45010	8.00	EA	RR ROCK FACE FULL FREE	70.000	EA	28.00	560.00
06/27	002-45010	8.00	EA	RR ROCK FACE FULL MIDDLE	70.000	EA	28.00	560.00
06/27	002-45010	23.00	EA	RR ROCK FACE FULL TOP	70.000	EA	80.50	1610.00
06/27	002-45010	39.00	EA	REDI ROCK DELIVERY CHAR	12.000	EA	23.40	468.00
06/27	002-45028	1.00	EA	RR ROCK FACE FULL CORNE	70.000	EA	3.50	70.00
06/27	002-45028	12.00	EA	RR ROCK FACE FULL FREE	70.000	EA	42.00	840.00
06/27	002-45028	5.00	EA	RR ROCK FACE FULL FREE	70.000	EA	17.50	350.00
06/27	002-45028	2.00	EA	RR ROCK FACE HALF FREE	35.000	EA	3.50	70.00
06/27	002-45028	20.00	EA	REDI ROCK DELIVERY CHAR	12.000	EA	12.00	240.00
06/28	002-45039	-15.00	EA	RR ROCK FACE FULL MIDDLE	70.000	EA	-52.50	-1050.00
06/28	002-45039	-3.00	EA	RR ROCK FACE FULL TOP	70.000	EA	-10.50	-210.00
06/28	002-45039	-1.00	EA	RR ROCK FACE HALF MIDDLE	35.000	EA	-1.75	-35.00

JOB TAX

825.15

JOB TOTAL

17328.15

FINANCE CHARGE: 1 1/2% per month or 18% per annum after 30 days

TOTAL DUE 17328.15

2' FREE STANDING 3341
 167.05



Newport Sand & Gravel Co., Inc.
 PO Box 1000 603 863-1000
 Newport, NH 03773 fax 603 863-3660

INVOICE

CUSTOMER NO.	DATE	INVOICE NO.	PAGE
011014	07/15/2002	71373	1

AZTEC CONSTRUCTION CO. INC.
 2 POWDERMILL ROAD
 MAYNARD, MA 01754

DATE	JOB NUMBER - JOB LOCATION - ADDRESS				PRICE	PER UNIT	TAX	TOTAL
	TICKET NO	QUANTITY	UNIT	DESCRIPTION				
000400	REDI ROCK WALL- BLOCKS			CLINTON				
07/10	002-45184	-1.00	EA	RR ROCK FACE FULL BOTTO	70.000	EA	-3.50	-70.00
07/10	002-45184	24.00	EA	RR ROCK FACE FULL FREE	70.000	EA	84.00	1680.00
07/10	002-45184	-1.00	EA	RR ROCK FACE FULL MIDDLE	70.000	EA	-3.50	-70.00
07/10	002-45184	-1.00	EA	RR ROCK FACE FULL TOP	70.000	EA	-3.50	-70.00
07/10	002-45184	24.00	EA	REDI ROCK DELIVERY CHAR	12.000	EA	14.40	288.00
07/11	002-45198	3.00	EA	RR ROCK FACE FULL FREE	70.000	EA	10.50	210.00
07/11	002-45198	2.00	EA	RR ROCK FACE FULL FREE	70.000	EA	7.00	140.00
07/11	002-45198	5.00	EA	REDI ROCK DELIVERY CHAR	12.000	EA	3.00	60.00
07/11	002-45198	35.00	EA	MISC SALES	20.000	EA	35.00	700.00
JOB TAX								143.40
JOB TOTAL								3011.40

*Div 2
 Retain
 Wall*

FINANCE CHARGE: 1 1/2% per month or 18% per annum after 30 days

TOTAL DUE

3011.40



INVOICE

Newport Sand & Gravel Co., Inc.PO Box 1000 603 863-1000
Newport, NH 03773 fax 603 863-3660

CUSTOMER NO.	DATE	INVOICE NO.	PAGE
011014	07/31/2002	72081	1

AZTEC CONSTRUCTION CO. INC.
2 POWDERMILL ROAD
MAYNARD, MA 01754

DATE	JOB NUMBER - JOB LOCATION - ADDRESS				PRICE	PER UNIT	TAX	TOTAL
	TICKET NO	QUANTITY	UNIT	DESCRIPTION				
000400	REDI ROCK WALL- BLOCKS			CLINTON				
07/30	002-45578	22.00	EA	RR ROCK FACE FULL FREE	70.000	EA	77.00	1540.00
07/30	002-45578	-3.00	EA	RR ROCK FACE FULL FREE	70.000	EA	-10.50	-210.00
07/30	002-45578	-1.00	EA	RR ROCK FACE FULL MIDDLE	70.000	EA	-3.50	-70.00
07/30	002-45578	-1.00	EA	RR ROCK FACE FULL STEP	70.000	EA	-3.50	-70.00
07/30	002-45578	-1.00	EA	RR ROCK FACE HALF FREE	35.000	EA	-1.75	-35.00
07/30	002-45578	22.00	EA	REDI ROCK DELIVERY CHAR	12.000	EA	13.20	264.00
07/30	002-45578	15.00	EA	MISC SALES	20.000	EA	15.00	300.00

JOB TAX 85.95
JOB TOTAL 1804.9502-01
Div #2 Refinance w/BL

FINANCE CHARGE: 1 1/2% per month or 18% per annum after 30 days

TOTAL DUE

1804.95

B



Newport Sand & Gravel Co., Inc.
P.O. Box 1000
Newport, NH 03773

603 863-1000
fax 603 863-3660

Aztec Construction Co., Inc.
2 Powdermill Road
Maynard, MA 01754

May 1, 2003

Dear Chris,

Please find enclosed a copy of the MDG Solutions engineering study which shows that the 5/8ths inch J-Bolt does meet the required test. This is good news for everyone.

Also enclosed is a printout of Aztec's account status with us. We look forward to immediate payment of the full principal balance outstanding and half of the interest charges for a total due of \$9,572.45.

As you are aware, while the J-Bolts installed meet the requirement, the height of your wall will have to be increased to meet the specifications required for a proper barrier system.

Should you have any questions with regards to the payment of the balance due please call me as soon as possible. If you have questions with regards to additional needs to increase the height of the barrier, please call John Peterman.

Very truly yours,

A handwritten signature in black ink, appearing to read "Brian P. Towne", written over a horizontal line.

Brian P. Towne
Chief Financial Officer

cc: William Connolly
Lincoln D. Realty Corporation